IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 16-11-1995.

CRIMINAL APPEAL NO. 123 OF 1990

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as tothe interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Shri Maganbhai M. Desai, Advocate for the appellant.
Shri S.T. Mehta, Additional Public Prosecutor for the respondent State.

Coram: A.N. Divecha,J. & H.R. Shelat,J.
(16-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The appellant-accused, who has been convicted of the offences under Section 302, 324 and 504 of the Indian Penal Code, and sentenced to life imprisonment for the offence under Section 302, rigorous imprisonment for six months and fine of Rs.100/- in default simple imprisonment of one month for the offence under Section 324, I.P.C., and 3 months simple imprisonment and fine of Rs.50/-, in default 15 days simple imprisonment more for the offence under Section 504, I.P.C.,by the then learned Additional Sessions Judge at Mehsana on 31st January 1990 by the judgment

and order passed in Sessions Case No. 48 of 1989, has preferred this appeal.

2. Chaturbhai Manibhai Raval maintains himself by doing labour. He, his wife Dahiben, his sons Lavji and Bhagu as well as his daughter Lilaben and others had been to Rangakui for the purpose of their livelihood. They had gone from their native place Bhimpura. Lakhiben is the sister of Chaturbhai Manibhai Raval. She has married the appellant. The appellant and his wife Lakhi had also gone to Rangakui for the purpose of livelihood. Two families were residing in the huts nearer to each other. The appellant was plying a camel cart for the purpose of carriage of goods from one place to another. Lakhiben and Dahiben were selling vegetables to the village people in consideration of grains at times called barter system. If the customers were not in a position to tender the grains, the consideration against the delivery of vegetables, on credit also they used to sell the same and collect the grains on the next day or when the customer used to give. On the day of the incident Dahiben and Lakhiben were altercating in respect of the collection of grains from the customers. Dahiben was under the belief that from her customers, Lakhiben had collected the grains, while Lakhiben was denying the same asserting that she collected her own from the customers. Both finding fault with each other were also abusing each other. Bhagu the son of Chaturbhai Manibhai Raval appealed both not to altercate and tried to pacify. At that time, the appellant went there with a knife and gave a knife blow to Bhagu on his chest causing injury to the heart. Chaturbhai Manibhai Raval tried to intervene, and therefore the second blow which was aimed at Bhagu struck Chaturbhai and so he came to be injured. Because of the shouts, neighbours assembled there. By the camel cart of the appellant injured Bhagubhai was taken to Gothwa for the purpose of treatment but the Doctor considering the case to be a serious one, advised them to go to Visnagar. The injured was then taken to Vijapur. The doctor at Vijapur examining injured Bhagu declared him dead. Thereafter a complaint before the police was lodged. The police carried out investigation. After the investigation was over the charge-sheet against the appellant was filed before the Court of the Judicial Magistrate, (First Class) at Visnagar alleging that on 16th January 1989 at 12.30 p.m. at Rangakui the appellant, knowing fully well that the injury he was going to cause was in the ordinary course of nature sufficient to cause death, gave a knife blow and causing fatal injury he intentionally caused the death of Bhagu Chaturbhai, and voluntarily caused injury by a knife, a sharp cutting instrument to Chaturbhai Manibhai. The learned Magistrate was not competent in law to hear and decide the case, and therefore he committed the case to the Court of Sessions at Mehsana. The case then came to be registered as Sessions Case No. 48 of 1989. It was assigned to the then Additional Sessions Judge, Mehsana for

hearing and disposal in accordance with law. A charge was framed at Exh.3 against the appellant. The appellant pleaded not guilty. The prosecution then adduced necessary evidence. At the conclusion of the trial, the learned Additional Sessions Judge found that the prosecution had beyond reasonable doubt established the charge and therefore he convicted the appellant, and sentenced him as aforesaid. The appellant has, therefore, preferred this appeal and has challenged the judgment and order convicting and sentencing him.

3. Mr. M.M. Desai, learned Advocate appearing on behalf of the appellant took us through the evidence on record and submitted that there was nothing on record justifying the conviction and sentence. According to him, complainant Chaturbhai Manibhai had gone to the appellant's house and scuffled after the appellant advised them not to abuse. When that is the case possibility of assailing the appellant by Chaturbhai cannot be ruled out. It seems the evidence is not correctly read because of a mistake committed by the typist. In between unnecessarily a full point has been typed and therefore the statement is found to have been divided into two independent parts giving rise to fallacy in the mind of those going through the evidence. But when with care it is read keeping its context in mind it becomes evident that the fact about scuffle, and then going to the appellant's house is categorically denied. When that is the case, the submission gains no ground to stand upon, and we cannot jump to the conclusion as canvassed by Shri Desai, learned Advocate representing the appellant.

4. It is alleged that the appellant took the panchas and police personnel to his place and pointed out the knife from the bundles of stalks. Chaturbhai Manibhai Raval the complainant however has come out with contrary version. According to him he snatched the knife from the appellant, and the appellant then ran away. Mr. Desai, the learned Advocate therefore submitted that such paradoxical case about the knife was not explained at all consequently the evidence of Chaturbhai Manibhai Raval and other witnesses could not be said to be free from doubt. The submission gains no ground to stand upon. The evidence of Chaturbhai is misread. It is because the typist, not careful in his duties, typed full-stops in between the whole statement, as a result the statement has been divided into two or more parts giving rise to a meaning foreign to it. In fact when read with great care, what becomes clear is that while cross-examining when a suggestion in defence was made, Chaturbhai denied the same stating that he had not gone to the appellant's house, scuffle did not take place, he did not snatch away the knife from the appellant and the appellant had not run away. There is thus a typist's mistake; in fact there is no paradoxical case about the knife.

5. It was next contended on behalf of the appellant that simply because the appellant pointed out the knife, he could not be implicated because the place wherefrom the knife was pointed out by him was some open land and accessible to all; anybody could have hidden the knife there, and the appellant might have any how come to know about the same. True that if the accused points out the place where any one can go freely and from that place the thing or weapon said to have been used for commission of offence is recovered, he cannot ordinarily be roped in with the offence as in that case he can be said to have known about the same any how or through any source and possession of the thing/weapon cannot be attributed to him. But if other persuasive or cogent circumstances on record fastens the accused with the offence, the recovery of the thing or weapon from the open place at the instance of the accused will in addition to other factors be indicative of the guilt of the accused.

6. The clothes of the deceased, as well as the appellant, blood collected from the dead body, blood-stained dust from the place of offence and the knife pointed out by the appellant were sent to the Chemical Analyser. It is reported by the chemical analyser that the blood group of the blood of the deceased was 'B'. The blood-group of the blood-stains on the knife is found to be 'B'. On the jacket (Band) of the appellant blood-stains were seen. The blood-group thereof is also found to be 'B'. On the bush-shirt of the deceased a cut-mark was found. The chemical analyser has opined that the cut-mark can possibly be caused by the muddamal knife's cut. Such facts on record not only confute the submission made but without any doubt connect the appellant with the offence. Of course the blood-group of the appellant cannot be found out from the evidence on record but that aspect loses the value because when the appellant was arrested no injury was found on his person. There is hence no scope for any other possibility, from such facts, favouring the appellant. In view of such convincing facts on record, the fact of recovery of the knife at the instance of the appellant from the place about 50 ft. from his house and near the heap of stalks cannot be construed as having a possibility favouring the appellant as canvassed.

7. Chaturbhai Manibhai Raval had gone to the police station along with others, and in the cross-examination it seems he inadvertantly made the statement that those who were accompanying him were prompting him and he was telling the same to the police which the police was noting down; but on such statement we cannot stamp the case of the prosecution a concoction, the outcome of vengeance of the complainant and his group. The evidence has to be appreciated as a whole and not picking up a statement from here and there. The capacities of the person cannot be overlooked, along with his infelicities. The complainant is a labourer and illiterate man. He is credulous. He does not know

in what manner he should narrate the case before the police. He may also miss to state a particular point, as every one is not expected to have a photographic memory and ability to narrate with exactitude. It is therefore quite possible that at times some one might be reminding a point so that the complaint might be written correctly and truly. It will therefore be unjust if we agree with the submission that some one remaining behind the curtain, induced complainant to lodge a false complaint against the appellant, or the complainant was made a tool of some one's cabal. Balubhai Mohanbhai (Exh.32) who recorded the complaint refutes possibility of some one's design to rope in the appellant. According to him the complainant was narrating and he noted down what the complainant stated to him. Nothing is asked to this witness suggesting that some one was prompting. The contention of the appellant therefore gains no ground to stand upon. On no other ground the judgment and order of the lower Court is assailed.

8. For the reasons stated hereinabove, we find no justification to accept any of the submissions made by the learned Advocate Mr. Desai and reach the conclusions favouring the appellant. We are satisfied, without any doubt that the appellant took up a cause so as to side his wife altercating with her bhabhi, and being provocated went to his place, brought out the knife and gave the blows to the deceased who was trying to bring both the warring women to reason and caused death. In view of such fact, the point that now arises for consideration is which of the penal provisions would apply.

9. As the incident happened because of the exchanges of abuses and heated words certainly the appellant was provoked as his wife was being abused and looked down upon. He then in the heat of excitement lost mental equilibrium as well as wisdom. He then went into his hut, took the knife, and rushing towards the deceased gave knife blows so as to deter the deceased from taking side of her mother, and make him to realise to have self restraints in such ticklish matter between two family members. The highhanded act must be frowned upon; but such facts would constitute the offence of culpable homicide not amounting to murder, and not murder, because intentionn to kill cannot be spelt out. While inflicting injury out of anger, he might not have knowledge that the death would be the most probable result, he must have the knowledge the death would be the likely result not amounting to murder. In our view therefore the case will fall within the ambit of Sec. 304, Part II and not Sec.302, Indian Penal Code. The conviction and sentence will have therefore to be altered suitably.

10. Chaturbhai came to be injured when he tried to rescue the deceased. The appellant was about to give another blow to the deceased but it struck the complainant as he intervened. It was

hence contended that the injury was not voluntary and so Sec.324 would not be attracted. This was obviously without prejudice to one's own defence.

11. If the person while causing injury gives the blow and accidently or for any other reason the blow lands on the person not aimed at, absence of mens rea cannot be assumed or accepted, the criminal intention is not obliterated; and the relevant penal provision will come into play. However in this case, we cannot uphold the conviction of the offence under Section 324, Indian Penal Code. The certificate of the doctor (Exh.16) does not support the case of injury having been caused by a knife. The doctor found abrasion which is possible by hard and blunt substance or by pointed instrument or by grazing tool. When incised wound is not seen, though ought to have been if the blow was at all given in the way alleged, possibility of unduly taking advantage of the injury having been sustained due to any other reason, cannot be ruled out. In any case, the appellant is entitled to benefit of doubt as causing of injury by knife is mistrustful or fishy. The conviction and sentence of the offence under Section 324, Indian Penal Code, cannot, therefore, be maintained.

12. So for as the offence under Section 504 is concerned, there is no evidence whatsoever on record which would justify us to maintain the conviction and sentence thereof. Whenever prosecution comes out with the case that the accused by uttering abuses, intentionally caused insult and thereby gave provocation to the complainant or others to break the public peace, it is incumbent upon the prosecution to bring those words uttered on record so that the Court can judge whether the words uttered would provoke any one to break public peace or commit any other offence or would cause insult. If evasively it is alleged that the accused uttered filthy language or revilled it would not be sufficient. In the case on hand, the alleged abusive words uttered are not brought on record in the evidence of any of the witnesses examined and therefore it is not possible to determine whether the alleged offence is committed; the charge under Section 504, Indian Penal Code in the result cannot be said to have been established; and therefore conviction and sentence inflicted in that regard by the lower court will have to be quashed.

13. Now question about the quantum of punishment of the offence under Section 304 Part 2, Indian Penal Code requires to be examined. We are conscious of the fact that the punishment must commensurate with the gravity of the offence, it can neither be light nor very harsh. In this case, because of the provocation, the appellant was led to commit the offence. Further the complainant and the appellant are closely related and for restoration of harmonious relations in future, neither harsh

nor lighter sentence but reasonable should be inflicted, and that must be the same undergone uptill now.

14. Under the circumstances, the appeal partly succeeds. We accordingly allow the appeal partly. The judgment and order of the lower court convicting the appellant of the offences under Section 302, 324 and 504 are hereby quashed and set aside; and the appellant is acquitted of the same. But the appellant is convicted of the offence under Section 304 Part II, Indian Penal Code altering the conviction of the offence under Section 302, Indian Penal Code and is sentenced to undergo the imprisonment he has undergone so far. As the sentence he has undergone uptill now is inflicted, the appellant-accused be set at liberty forthwith if no longer required in any other matter.

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